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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 147

THE STATE OF WEST VIRGINIA, at the Relation of
DR. N. H. DYER and W. W. JENNINGS, Commis-
sioners for the State of West Virginia to The Ohio
River Water Sanitation Commission, D. Jackson
Savage, Chairman of the State Water Commission of
the State of West Virginia, and Dr. N. H. Dyer,
W. W. Jennings, Dan B. Fleming, and Dr. C. F. Mc-
Clintic, Members of the State Water Commission,
Petitioner,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia,
Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION
TO ALLOWANCE OF WRIT OF CERTIORARI**

CHARLES C. WISE, JR.,
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SUBJECT INDEX AND SUMMARY

JURISDICTION

PAGE.

This Court should not take jurisdiction because:

1. Consent of Congress does not make a compact a Federal treaty or statute 2, 3
2. Petitioner at no time specially set up and claimed in a state court any Federal title, right, privilege or immunity 1, 2, 3
3. No *construction* of Compact involved 3, 4
4. The State Court considered solely the question of the capacity of the Legislature to pass the Act 5
5. The Act contains vices not found in Compact 5
6. No Federal question considered or decided by State Court but purely local constitutional questions for which certiorari is not allowed 4, 5, 6, 7

THE CONSTITUTION OF WEST VIRGINIA GOVERNS THE CAPACITY OF ITS LEGISLATURE TO PASS THE ACT

1. There is no conflict between Federal and State Constitutions 8, 9
2. A compact to be valid must comply with the Constitutions of the United States and the states which are parties thereto 9, 10, 11, 12

ARTICLE X, SECTION 4 OF WEST VIRGINIA CONSTITUTION PROHIBITS THE ACT

1. The Constitution clearly provides that "No debt shall be contracted" 12, 13
2. Section 5 of the Act as well as the Compact creates a "debt" or "liability" 13, 14
3. The State Court's interpretation of constitution on fiscal affairs is controlling 14

LEGISLATURE CAN NOT SURRENDER POLICE POWER NOR BIND FUTURE LEGISLATURES

	PAGE
1. Police power can not be surrendered under West Virginia Constitution	14-15
2. The Act surrenders to a Commission the police power of the State	15, 16, 17
(a) No proper legislative standards	15
(b) No requirement of uniformity or generality of orders	15
(c) The Commission is investigator, law-maker, prosecutor and judge	15
(d) Purported grant or extraterritorial jurisdiction to courts	16
(e) Purported grant of powers to Commissioners as well as Commission	16-17
(f) Commission is made a superstate beyond control of the Federal Government and the states	17
(g) No state legislature may bind any future legislature respecting police and legislative powers	17
3. Comparison of instant Compact with other compacts	18

CONCLUSION

1. State Court does not place in jeopardy proper interstate compacts	18, 19
2. No controversy or conflicting rights between states or other parties decided by State Court	19
3. The states involved can by modification of Compact conform to West Virginia Constitution without impairing effectiveness to deal with pollution	19-20

TABLE OF CASES

	PAGE
Bates v. State Bridge Commission, 109 W. Va. 186, 153 S. E. 305	13
Delaware River Joint Toll Bridge Commission v. Colburn, 310 U. S. 419, 84 L. ed. 1287	1
Glenn v. Field Packing Co., 290 U. S. 177, 78 L. ed. 252	7
Henderson v. Delaware River Joint Toll Bridge Com- mission, 362 Pa. 475, 66 A. (2d) 843	2-3
Hinderlider v. La Plata R. & Cherry Creek D. Co., 304 U. S. 92, 82 L. ed. 1203	2-9-11
Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19	5
Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151	7
Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111	5
International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 161 A. L. R. 1057	16
James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318	16
Kentucky v. Indiana, 281 U. S. 163, 74 L. ed. 784	6
King v. West Virginia, 216 U. S. 92, 54 L. ed. 396	7
Mumpower v. Housing Authority, 176 Va. 426, 11 S. E. (2d) 732	15
Neblett v. Carpenter, 305 U. S. 297, 83 L. ed. 182	7
New York v. Wilcox, 115 Misc. 351, 189 N. Y. S. 724	10
North Dakota v. Minnesota, 263 U. S. 365, 68 L. ed. 342	6
Ohio Ex. Rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172	7
Parker v. Riley, 18 Cal. (2d) 57, 113 P. (2d) 873, 134 A. L. R. 1405	10

	PAGE
Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565	16
Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. ed. 565	9
Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 29 S. Ct. 580	5
Riley v. New York Trust Co., 315 U. S. 343, 86 L. ed. 885	5
Riverside, etc. v. Menfee, 237 U. S. 189, 35 S. Ct. 579, 59 L. ed. 910	16
Salomon v. Graham, 15 Wall. (U. S.) 208, 21 L. ed. 37	7
Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A. L. R. 706	4
State ex. rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210	4
State v. Arregui, 44 Idaho 43, 254 P. 788, 52 A. L. R. 463	5
State v. Bunner, 126 W. Va. 280, 27 S. E. (2d) 823	15
State v. Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000	5
Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162	6
United States v. Bekins, 304 U. S. 27, 82 L. ed. 1137	9
Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537	8
Virginia v. West Virginia, 11 Wall. (U. S.) 39, 20 L. ed. 67	8
Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669	8
Wood v. Hamaduchi, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861	5

CONSTITUTIONS

Constitution of the United States, Article I, Section	8, 9
10	

	PAGE
Constitution of West Virginia, Article VI, Section 1	14
Constitution of West Virginia, Article X, Section 4	12, 13

STATUTES

Acts of the West Virginia Legislature, 1939, Chapter 38	3, 4, 12, 14, 15, 16, 18, 19
---	------------------------------

TEXTS AND ARTICLES

Annotations in 63 L. R. A. 571	7
Annotations in 40 L. R. A. (N. S.) 609	7
Annotations in 134 A. L. R. 1411	9-18
I Cooley's Constitutional Limitations (8th ed.) 436	15
II Cooley's Constitutional Limitations (8th ed.) 1223	15
37 Michigan Law Review, 129, 130, 131	9
34 Yale Law Journal, 685	10

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**BRIEF OF RESPONDENT OPPOSING THE
ALLOWANCE OF A WRIT OF CERTIORARI**

JURISDICTION

Petitioner predicates its contention that this Court has jurisdiction of this proceeding on *Delaware River Joint Toll Bridge Commission v. Colburn*, (1940) 310 U. S. 419, 84 L. ed. 1287, which held that *the construction of an interstate Compact sanctioned by the Congress* " * * * involves a Federal title, right, privilege or im-

munity which, *when specially set up and claimed in a state court, * * ** could be reviewed by this Court on certiorari. (Italics supplied.)

Petitioner further contends that "This Compact, by the sanction of Congress has become a law of the Union." (Petitioner's brief p. 22.) This latter contention is not urged. The case of *Hinderlider v. La Plata R. & Cherry Creek D. Co.*, (1938) 304 U. S. 92, 82 L. ed. 1203, expressly upheld a long line of decisions of this Court unequivocally deciding that the consent of Congress to a Compact between states does not make it a "treaty or statute of the United States" within the meaning of the Judicial Code.

The controlling law of this Court is clearly and succinctly stated in *Henderson v. Delaware River Joint Toll Bridge Commission*, (1949) 362 Pa. 475, 66 A. 2d 843.

The inhibition of Article I, Sec. 10, cl. 3, of the Constitution that "No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State * * *" presupposes State action in the premises. And, while consent of Congress is required in the circumstances to validate the State action, it continues, nonetheless, to be State action. In *People v. Central Railroad*, 12 Wall. 455, 456, 20 L. Ed. 458, 79 U. S. 455, 20 L. Ed. 458, it was held that the consent of Congress to a compact between States did not make the compact a statute of the United States so as to justify a writ of error to a State court on the ground that a statute of the United States was thereby drawn in question. Nor does the case of *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U. S. 419, 60 S. Ct. 1039, 1041, 84 L. Ed. 1287, which the intervenors cite, derogate from the principle presently pertinent. It is true that in the *Colburn* case the ruling in

People v. Central Railroad, supra, was modified to the extent that jurisdiction of a case involving a compact between States was taken on certiorari by the United States Supreme Court, *not*, however, because of a statute of the United States was thus drawn in question, but because the congressional sanction of the compact under Article I, sec. 10, cl. 3, of the Constitution "involves a federal "title, right, privilege or immunity" which, when set up in a State court, may be reviewed in the Supreme Court on certiorari by virtue of Section 237(b) of the Judicial Code, 28 U. S. C. A. § 344 (now § 1257)."

Petitioner does not and can not bring the instant controversy within the jurisdictional requirements of the *Delaware River* case, supra.

Petitioner at no time "specially set up and claimed in a state court" any Federal title, right, privilege or immunity.

The petition filed in the state court, the forum of petitioner's choice, merely recites that the Congress approved the making of the Compact. At no place in the petition, in briefs or in argument did petitioner at any time set up or claim that any Federal title, right, privilege or immunity is involved in this proceeding.

The *Delaware River* case involved the construction of an interstate compact. Respondent contends that the Supreme Court of Appeals of West Virginia was not asked to consider or decide any question involving the construction of an interstate compact. The majority opinion states "The sole question to be determined in this proceeding is the power of the Legislature of this State to enact Chapter 38, Acts of the Legislature, 1939." The majority and minority opinions of the West Virginia court are in agreement that the sole grounds upon which the Act of the West Virginia Legislature was declared

unconstitutional are (1) express provisions of the West Virginia Constitution dealing with internal fiscal affairs, and (2) an unconstitutional delegation of the sovereign police power of the State. The terms of the Compact in question are clear and unambiguous. The state court considered solely the question of the *capacity* of the West Virginia Legislature to enact Chapter 38, Acts of the Legislature, 1939. Of great significance is the fact that Section 3 of this Act, among other things, purported to grant to the Commission and the Commissioners individually "* * * all the powers provided for in the said Compact and all the powers necessary or incidental to the carrying out of said Compact in every particular." Furthermore Section 5 of the same act, going far beyond the language of the Compact, makes provision for appropriations to the Commission and the Commissioners individually and binds succeeding legislatures in perpetuity to appropriate funds for the payment of West Virginia's share of the budget of the Commission. Therefore it is apparent that the two grounds upon which the West Virginia Court held the statute to be unconstitutional arise not merely from language of the Compact, but also from additional provisions of the West Virginia statute which are found in that Act alone. (See Appendix C. Petitioner's Brief).

The Supreme Court of Appeals of West Virginia applied the clear mandate of the West Virginia Constitution and universally recognized constitutional principles to an Act of its Legislature. There is no federal question involved in a state court's application of its own constitution to an act of its legislature.

In the American governmental system a state constitution is the fundamental paramount law governing all departments of the state government. *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 P. 210; *Simpson v. Hill*, 128 Okla. 269, 263 P. 635, 56 A. L. R. 706.

This Court as well as state courts has recognized that one of the chief functions of a constitution is to limit the powers of the government and operate as a bulwark of liberty for the protection of the reserved rights of the people under both federal and state constitutions. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111; *State v. Arregui*, 44 Idaho 43, 254 P. 788, 52 A. L. R. 463.

Upon adoption of the Federal Constitution, the states retained all their original sovereignty except that surrendered to the Federal Government. *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 29 S. Ct. 580. The doctrine of a higher law than the constitution has no place in American jurisprudence. *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000.

Since the early days of this Court, it has been universally held that every state law must conform both to the Constitution of the United States and the constitution of the particular state, and if such enactment infringes upon either, the state statute is void. *Houston v. Moore*, 5 Wheat. (U. S.) 1, 5 L. ed. 19. Any act which a state constitution prohibits is beyond the power of the legislature, however proper it might be as a police regulation except for the constitution. *Wood v. Hamaduchi*, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861.

The cases relied upon by petitioner at pages 14 and 15 of its brief do not support the contention that the mere recital in the petition that the Congress had given approval to the Compact is sufficient to meet the requirement of specially setting up and claiming in a state court a Federal title, right, privilege or immunity. *Riley v. New York Trust Company*, 315 U. S. 343, 86 L. ed. 885, cited by petitioner, plainly reveals that express reliance at the trial was placed upon the full faith and credit clause of the Federal Constitution.

Respondent submits that contrary to petitioner's contention, an examination of the opinions of the Supreme Court of West Virginia will manifestly show that it did not assume that a Federal question was in issue and clearly the decision rested upon purely local constitutional grounds within the exclusive province of the highest court of the state to resolve.

Kentucky v. Indiana, 231 U. S. 163, 74 L. ed. 784, upon which petitioner relies, deals with an agreement between the states to construct a bridge. The defendant, Indiana, by answer expressly asserted it believed the contract to be valid although some of the citizens of that state sought to enjoin performance of the agreement upon unspecified grounds. Under such circumstances, this Court passed upon a controversy between states within its original jurisdiction under the principles governing such cases enunciated in *North Dakota v. Minnesota*, (1923) 263 U. S. 365, 68 L. ed. 342. No question as to the power of a state to enter into the Compact under its constitution was presented. Furthermore, the state court had not acted on the injunction sought by citizens thereof. As distinguished from the instant controversy where no controversy exists as between states, no question of construction of the Compact arises and the matter being limited to the consideration of the capacity of the state legislature under its constitution to enter into the Compact, it is plain that such case is neither applicable to nor decisive of this application.

Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, cited by petitioner, did not involve any question of the power and capacity of the legislature of a state under its constitution to enter into a compact upon the terms provided in an act, but dealt with the question of whether a new amendment to a state constitution impaired a pre-existing contract within the meaning of the contract clause of the federal constitution, which has always been

recognized as the most common example of a Federal title, privilege or immunity.

The rule has been long established that federal courts will follow the decisions of state courts as to the construction of state constitutions and that state courts are the final arbiters of questions of conformity of state statutes to the constitution of a state. *Glenn v. Field Packing Co.*, 290 U. S. 177, 78 L. ed. 252. *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151. Annotations: 63 L. R. A. 571 and 40 L. R. A. (N. S.) 609.

This court has held that it is without jurisdiction on certiorari to review holdings of a state court which concern matters of state law and amount, at most, to alleged erroneous construction of statutes or constitutions of a state by its own courts. *Neblett v. Carpenter*, 305 U. S. 297, 83 L. ed. 182.

A question of illegal delegation of legislative power to state bodies or officers or to the people does not raise a federal question but is a matter of local concern and for state courts. *Ohio Ex Rel. Davis v. Hildebrant*, 241 U. S. 565, 60 L. ed. 1172.

Respecting the fiscal affairs of a state, the decision of a state court holding unconstitutional a statute increasing the debt of the state involves no federal question for review. *Salomon v. Graham*, 15 Wall. 208, 21 L. ed. 37; *King v. West Virginia*, 216 U. S. 92, 54 L. ed. 396.

While other cases will be discussed hereinafter which have relevancy to the question of jurisdiction, it is respectfully submitted that, since petitioner neither set up nor claimed in the state court any Federal right, privilege or immunity and the state court did not consider nor decide any Federal question, this Court should not take jurisdiction of this proceeding and allow a writ.

**THE CONSTITUTION OF WEST VIRGINIA GOVERNS THE
POWER AND CAPACITY OF ITS LEGISLATURE TO ENACT
AN INTERSTATE COMPACT.**

At page 8 of its petition and brief, petitioner contends that the first question presented " * * * involves a conflict between certain language of the Constitution of West Virginia and the language of Article I, Section 10, Clause 3, of the Constitution of the United States * * * "

This theory of petitioner is without foundation to support it, and is counter to fundamental American concepts of law.

The states were sovereign entities prior to the adoption of the Constitution of the United States. Following the Declaration of Independence, there was no limitation whatsoever upon the right of any state to exercise the sovereign power of making an alliance or contract with any other state or country. The Articles of Confederation provided that no state should enter into an alliance or confederation. Later, when the Constitution of the United States was adopted, the language of the Articles of Confederation was in substance incorporated in the Constitution, Article I, Section 10, and in addition thereto, Clause 3 thereof provides that no state shall compact with another state without congressional approval. It is recognized that the reason for this limitation was to prevent compacts dealing with political matters and subjects within the proper sphere of the Federal Government and that in cases where such subjects were not involved, the states might, in the exercise of their reserved powers under the Tenth Amendment to the Constitution, compact with each other without congressional consent. *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 537. Other cases hold that congressional consent may be implied. *Wharton v. Wise*, 153 U. S. 155, 38 L. ed. 669; *Virginia v. West Virginia*, 11 Wall. 39, 20 L. ed.

67. Clearly the Congress cannot compel a state to compact with another, the only power granted to the Congress being that of rejecting any interstate compact which the states might desire to make. Manifestly there was and is no conflict between the Constitution of West Virginia and Article I, Section 10, Clause 3, of the Constitution of the United States.

The *Hinderlider* case, *supra*, (P. 1212 L. ed.) recognizes that an interstate compact is binding unless there was " * * * in the proceedings leading up to the compact or in its application some vitiating infirmity". This Court remarks that no such infirmity or illegality is shown, but by implication it is clear that by reason of the limitation of a state constitution there well could be some vitiating illegality which would render an interstate compact null and void. This position is further supported by *United States v. Bekins*, 304 U. S. 27, 82 L. ed. 1137, 1144, in which a statute is upheld because it " * * * is carefully drawn so as not to impinge upon the sovereignty of the state. The state retains control of its fiscal affairs."

The case of *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565, clearly indicates that a compact to be valid must comply with both the Constitution of the United States and the constitution of any state which joins therein.

"The states of the Union are restricted in their powers to make agreements with other States by the United States Constitution, as well as by various state constitutional provisions." Annotation 134 A. L. R. 1411, 1412 and cases there cited.

In 37 Michigan Law Review 129, 130, 131, (1938) commenting upon the *Hinderlider* case, *supra*, G. M. Stevens cogently states:

"Congressional assent does not make it a law of the United States. For the requirement of Congressional assent is not a grant of legislative power

to Congress, but a limitation on an inherent power of the States. This interpretation is particularly emphasized by the doctrine that not all compacts need Congressional ratification. *It seems, then, that interstate compacts are essentially legislative acts of the signatory States and should be subject to the ordinary Constitutional restraints placed upon such legislation.*" (Italics supplied).

The Supreme Court of California upheld the creation of a state commission on interstate cooperation because its duties were properly limited to collecting information and making recommendations to the legislature. *Parker v. Riley*, 18 Cal. (2d) 57, 113 P. (2d) 873, 134 A. L. R. 1405.

In *New York v. Willcox*, 115 Misc. 351, 189 N. Y. S. 724, a compact between New York and New Jersey dealing with the important development of the Port of New York, was upheld because the joint Port Authority was merely authorized to prepare rules and regulations which each state should adopt and for the specific reason that each state retained strictly its own sovereignty, no control having been given to the Port Authority over any property belonging to either state or the citizens thereof.

Respondent cited in the State court the article by Frankfurter and Landis: "The Compact Clause of the Constitution—A Study in Interstate Adjustments." 34 Yale L. J. 685, for the purpose of pointing out the history and nature of interstate compacts heretofore entered into and the possibilities of controlling the problem of pollution in the Ohio basin by a proper and lawful interstate compact. Petitioner now seeks to torture certain language found in this article into an implied support of its contentions at pages 19 and 20 of petitioner's brief, but clearly no consideration was there given to the power of a legislature to adopt a compact by legislation contrary to the state constitution.

It is likewise submitted that petitioner, (Brief p. 20), attempts a tortured construction of the *Hinderlider* case, *supra*. There the Supreme Court of Colorado purported to construe an interstate compact and to hold it invalid because of the adjustment of interstate water rights by a process of bartering. This Court very properly reversed because of the false assumption by the Colorado court that a judicial decision of controverted claims is essential to the validity of a compact adjustment. Furthermore, the Colorado court's decree obviously could not bind another state or its citizens who were not parties to the suit. As distinguished from the instant controversy, there was no express constitutional provision of Colorado governing the question which the Colorado court sought to decide, and rights to an interstate stream being involved, there was clearly jurisdiction in this court.

Contrary to the position taken by petitioner at page 23 of its brief, respondent submits that if a state constitution cannot control the power of its legislature to enter into a compact, then state sovereignty is thereby extinguished for all practical purposes. Since colonial days the states have entered into many compacts, but in conformity to the requirements of their respective constitutions. There is no burden placed upon a state by requiring it to contract within its constitutional powers. To take the view of petitioner would lead to the conclusion that a state could barter away its legislative power, its judicial power, or executive power to another state or to the Federal Government or to a hybrid commission as was done in the instant Compact, and thus effectually destroy its sovereignty.

The consent of Congress to the negotiation of the Compact provides that no compact or agreement made thereunder shall be binding or obligatory upon any state unless and until it has been approved by the legislatures of each of the states whose assent is contemplated.

(Appendix A. Petitioner's brief.) This supports the general law that it is entirely up to each state whether it enters into the compact. Capacity to enter into a contract is, of course, essential to the validity of any contract. The capacity of the Legislature of the State of West Virginia is measurable and determinable solely by the Constitution of West Virginia as interpreted by the highest court of that state. This principle is believed to be so fundamental that a denial thereof would be tantamount to robbing each state of its sovereignty. Here no agreement was made because the Legislature of the State of West Virginia clearly had no capacity to contract as it purported to do. There is, accordingly, no valid contract for interpretation or construction insofar as the State of West Virginia is concerned.

ARTICLE X, SECTION 4 OF THE CONSTITUTION OF WEST VIRGINIA PLAINLY PROHIBITS THE ENACTMENT OF CHAPTER 38, ACTS OF THE WEST VIRGINIA LEGISLATURE, 1939.

This article of the West Virginia Constitution, (Appendix D of petitioner's brief) covers Taxation and Finance, important matters recognized to be wholly of internal concern to the State of West Virginia. Section 4 unequivocally provides that "*No debt shall be contracted by this State, * * **" except for certain named purposes irrelevant to this issue. And further, that the payment of "*any liability except for ordinary expenses of the State shall be equally distributed over a period of at least twenty years.*" The words "debt" and "liability" are plainly used in the broadest sense, and without resort to rules of construction, it is manifest that the obligations of the Compact and Section 5 of Chapter 38, Acts of the Legislature 1939, fall within the prohibition of the West Virginia Constitution. The highest court of the State of West Virginia alone should pass upon a question re-

lating to its internal fiscal affairs. This is particularly true since the right of no other state or party has accrued under the Compact.

Petitioner quotes from *Bates v. State Bridge Commission*, 109 W. Va. 186, 153 S. E. 305. (Brief p. 27). The last clause of the quotation makes it clear that the State court has construed Article X, Section 4 of the constitution to cover any and all debts and liabilities. The holding is without restriction: "The debts against which the prohibition lies are those for which suit may be maintained or the state's revenues and resources pledged or sequestered."

The field of interstate compacts had already been explored and developed at the time of the adoption of this provision of the West Virginia constitution. If the people had desired to except such compacts, they could have done so and would have refrained from the broad language of the prohibition which permits no exclusion by implication.

Article X of the Compact (quoted at Page 30, Petitioner's brief) plainly and unmistakably constitutes an agreement to appropriate for salaries, office and other administrative expenses this state's part of the annual budget as determined by the Commission, composed of three members from each of the states signatory thereto and three from the Federal Government, and approved by the governors of such states. Petitioner urges that the provision for budgetary approval by the governors assures control of appropriations. Under the Constitution of West Virginia, no act of the governor can waive any constitutional provisions. A governor may do no more than recommend appropriations to the legislature. Plainly Article X of the Compact does not require the budget as determined by the Commission to be approved by the governor of *each* state which is a party to the

Compact. Therefore a concurrence of a *majority* of the governors would control and be decisive. Furthermore, Section 5 of Chapter 38, Acts of 1939, goes far beyond the obligations created by Article X and purports to bind future legislatures to make appropriations, not only for the purposes provided in Article X but for expenses and other items. Both the language of Article X and that of Section 5 are plainly in violation of the Constitution of West Virginia, which provides that "no debt" shall be incurred by the State or "any liability" paid except upon the basis provided therein.

As hereinbefore noted, federal and state courts uniformly recognize that the fiscal affairs of a state are matters of internal government and certainly within the limitations of unequivocal provisions of the state constitution and the interpretations thereof which are properly within the exclusive jurisdiction of the highest court of the state.

NO STATE IN THE AMERICAN UNION CAN CONSTITUTIONALLY ABRIDGE OR SURRENDER ITS SOVEREIGN POLICE POWER, NOR CAN ONE LEGISLATURE BIND ANOTHER IN THE EXERCISE OF SOVEREIGN LEGISLATIVE FUNCTIONS, AS CHAPTER 38, ACTS OF THE WEST VIRGINIA LEGISLATURE, 1939, PURPORTED TO DO.

The State Supreme Court held that the Act of the West Virginia Legislature resulted in an unauthorized surrender of the police power of the State. Section 1 of Article VI of the West Virginia Constitution, quoted in the majority opinion (R. p. 26), contrary to petitioner's contention (Brief p. 31), provides "The legislative power shall be vested in a Senate and House of Delegates. * * *" In accord with universal holdings of this and other courts, the very essence of legislative power and sovereignty is the police power which is reserved to the states. Such legislative power under plain constitutional

mandate cannot be surrendered or abridged in any manner. *State v. Bunner*, 126 W. Va. 280, 282, 27 S. E. 2d 823; *Mumpower v. Housing Authority*, 176 Va. 426, 11 S. E. 2d 732. See 1 Cooley's Constitutional Limitations (8th ed.) 436; 2 Cooley's Constitutional Limitations (8th ed.) 1223.

Chapter 38, Acts of the Legislature 1939, unconstitutionally purports to surrender to a hybrid commission the police power of the State in the following particulars:

1. After providing a standard in Article VI of the Compact to the effect that 45% of total suspended solids shall be removed by anyone discharging sewage into any water in the Ohio River basin within a reasonable time, the Commission is authorized to fix such higher degree of treatment as it may determine to be necessary. No standards are provided to guide the Commission in such matter. Respecting industrial wastes, unlimited discretion is given the Commission. Therefore, adequate legislative standards are not provided.

2. No provision is made requiring uniformity or generality in any order of the Commission; on the contrary, it appears that the Commission not only can but is expected to make such orders as it sees fit in each individual case.

3. The Commission is made the fact finder, the legislator of standards, the hearing tribunal, and furthermore it is authorized to carry out these functions under such rules and regulations as it may in its absolute discretion establish and there is no provision that such rules and regulations themselves shall be of uniform character and application. In short, the Commission is the investigator, the law-maker, the prosecutor and the judge to a degree unprecedented in an era which has sanctioned the grant to administrative bodies of vast powers.

4. Article IX of the Compact purports to grant to any court of general jurisdiction and any United States district court in any of the eight states signing the compact jurisdiction by extraordinary remedy to enforce any order of the commission against any person, public or private, “* * * domiciled or located within such state, or whose discharge of the waste takes place within or *adjoining such state*” * * *.” (Italics supplied). This unprecedented grant of jurisdiction purports to authorize any Federal District Court in West Virginia or any court of general jurisdiction in that state to enforce an order against a person domiciled or located either in West Virginia or in any state adjoining West Virginia if such person or entity discharges waste from this or an adjoining state. This language of the Compact clearly attempts to grant extraterritorial jurisdiction to courts. If a person in West Virginia discharged waste in a tributary of the Ohio River and failed to obey an order of the Commission, he could, under the language quoted, be haled into any federal or state court of general jurisdiction in Pennsylvania, Ohio, Virginia or Kentucky, in addition to such courts of the state of his domicile. This provision of the Compact is a startlingly new concept of government wholly foreign to the American constitutional system, which recognizes that courts of a state are limited to the territory of that state.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565;

International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 161 A. L. R. 1057; and

Riverside etc. v. Menefee, 237 U. S. 189, 35 S. Ct. 579, 59 L. ed. 910.

Cf. *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 114 A. L. R. 318.

5. Section 3, Acts of the Legislature 1939, over and above the provisions of the Compact, purports to give the

same broad governmental powers not only to the Commission but to each commissioner, irrespective of the fact that 24 of them are neither residents nor officers of the State of West Virginia. In this connection, it should be noted that the Supreme Court of West Virginia holds in this case that the broad powers purported to be granted by the act in question would not be constitutional even if a purely state commission were involved.

6. Of great significance is the fact that the Commission, once established, owes no specific allegiance to any state or to the Federal government. The Commission is, in effect, a super-state with purportedly broad powers affecting the lives and property of citizens of many states.

7. No state legislature may bind or abridge the power of any future legislature respecting the exercise of its police and legislative powers. A majority of the commissioners forming the Commission are authorized to make any order in the premises they, in their absolute discretion, may see fit to do. It is true that a majority of the commissioners of a particular state may veto, in effect, an order against a person or entity domiciled in such state. Each commissioner, while appointed by a particular state or by the President as the case may be, owes no allegiance nor is he subject to the effective control of any state or of the Federal government. The so-called veto power which petitioner urges as the saving clause for the Compact may in practical effect amount to the greatest vice inherent in it. Improper tactics such as "log-rolling" may very well in practice determine what orders, if any, of the Commission are enforced. Such a practice would not comport with the American system of government, which in this instance at the very least would seem to require proper legislative standards and a definition of the duty owed by the commissioners

to the Federal government and the respective states which they represent.

A reasonable effort has been made to examine the provisions of existing compacts of which there are many. None has been found containing any one of the unprecedented features heretofore pointed out, which are considered the vice of the Act in question. Many of the cases which have arisen respecting interstate compacts are annotated in 134 A. L. R. 1411. Most compacts deal with a specific tangible object such as boundaries, bridges or ports, or else provide for cooperation between the states. Generally, compacts providing for cooperation provide that commissioners from the respective states signatory thereto shall meet, agree upon and recommend to the legislatures of their respective states the adoption of uniform legislation covering the subject matter.

Cases heretofore cited hold that questions of delegation of the police power of a state are proper matters for the courts of such state to determine. It is believed that there can be no question but that here the Supreme Court of West Virginia not only determined, but properly so, that an unconstitutional surrender of the police power of the state is inferent in Chapter 38, Acts of the Legislature, 1939. This infirmity inheres not only in the Compact but in other sections of the West Virginia Act.

CONCLUSION

The questions raised and decided in this proceeding admittedly are of great public and general interest. It is of great concern to the people of all the states in the Ohio Basin, to know whether the West Virginia Legislature had capacity to pass the enabling legislation in question. But it should be noted that the West Virginia decision does not purport to consider the validity of the Compact as to any other state, recognizing that its validity

must be determined by the constitutions of the respective states which are parties thereto. It should be further recognized that the West Virginia decision does not place in jeopardy any proper interstate compact of the character heretofore entered into, the instant Compact being unique and unprecedented in scope.

The Compact in question has just recently been executed. It was not made to settle any pre-existing controversy or adjudicate conflicting rights of states or other parties. Its operation will be altogether prospective. The appropriation which the Supreme Court of West Virginia held to be unconstitutional is the first made under the Compact. No rights of any other state or party have accrued. The State Court did not attempt to consider or decide any such conflicting rights.

The Supreme Court of Appeals of West Virginia and this respondent are in complete accord with petitioner that interstate compacts, when properly drawn and within the powers of the contracting bodies, are laudable and offer rich possibilities for working out regional problems which states severally cannot solve. The control of pollution of the streams in the Ohio River basin is indeed a commendable object and suitable for an appropriate interstate compact. The states involved can readily agree to an appropriate modification of the instant Compact thereby conforming to the Constitution of West Virginia without impairing the effectiveness of the parties to deal with the subject. The significant point remains, however, that the instant controversy arises because Chapter 38, Acts of the Legislature, 1939, clearly conflicts with the Constitution of the State of West Virginia, and accordingly, the legislature of that state had no capacity to pass the questioned Act. However important the control of stream pollution may be, it is not nearly so grave a threat as the pollution of the Ameri-

can form of constitutional government by an Act containing the vices herein pointed out.

It is accordingly respectfully submitted for the reasons advanced, under established law, that a writ of certiorari should be denied.

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